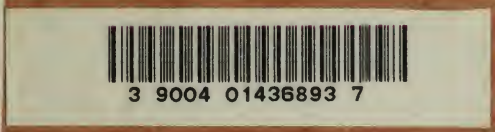
Queen's University
Mathieson v. Weir

P
012
1866
Q



Queen's University
Library

KINGSTON, ONTARIO

F5012
1866 Q

IN ERROR AND APPEAL.

Mathieson v. Weir.

JUDGMENT.

The Judgment of the Court was delivered by

Hagarty, J.—I propose, first, to consider the question of jurisdiction.

The charter authorizes the Trustees to appoint a Principal and such Professors, Masters and Tutors, and such other officers, as to them shall seem meet. (Sec. 12.)

As soon as there should be a Principal and one Professor, the Trustees have authority to constitute the "College Senate" for the exercise of academic discipline, &c., and all the Professors should be members thereof. (Sec. 29.)

The Trustees have power to make statutes and rules, to regulate the number, residence and duties of the Professors, and their salaries, stipends and emoluments, and the same to revoke, vary and alter. Whenever there should be a Principal and four Professors, the Senate should have power to confer Degrees in Arts and Faculties. (Sec. 19.)

The charter was granted in 1842, and in 1853 the then first Principal, Dr. Cook, was directed by the Trustees to proceed to Scotland and engage Professors for the College; and the Plaintiff was offered and accepted the professorship of classical literature at a salary of £350 a year.

The endowment of the College consisted of gifts and subscriptions. No fund or property appears to have been provided from any public source. The Crown did nothing beyond granting the charter. Annual collections are made for bursaries, and moneys and property, by gift and bequest, have been obtained from individuals. The Provincial Legislature has usually made an annual grant to this College with several others. No particular fund is set apart or exists for the support of this chair of classical literature. The stipend seems to be paid from the general funds of the College.

It seems conceded that to ground the jurisdiction of the court there must be the position of trustees and *cesti que trust* between the defendants and the plaintiff—that there must be a *trust* in the sense in which that word is understood, in Courts of Equity, to warrant its interference.

The charter does not create the office held by plaintiff; his office is not of the essence of the corporation. The creation of a chair of classical literature was wholly the act of the trustees under their chartered powers; they were not bound to create it, and it was conceded in argument that they have the power to suppress it altogether. The corporation existed prior to its creation, and can exist after its suppression, exercising all its University functions. From the vast mass of cases, bearing more or less on the question, two or three may be selected.

Whiston *v.* The Dean and Chapter of Rochester (7 Hare 532), decided by Sir James Wigram in 1849, appears not to have been cited in the court below. The charter of Henry VIII. establishing the cathedral church provided that there should be always a "Preceptor puerorum in grammatica." A stated salary was assigned to him from the church funds.

The plaintiff was appointed master of the Grammar School in 1842 at a fixed salary, and in consequence of certain differences with the Dean and Chapter, was dismissed by them. He filed his bill to restrain them from removing him or appointing a successor, and after a very able argument by Sir J. Romilly for plaintiff, and Roundell Palmer for defendants, Sir James Wigram refused with costs a motion for injunction. He says:—"I never entertained a doubt that if it could be established that the Dean and Chapter were trustees for the master of the Grammar School, he would be entitled to the assistance of the court in enforcing the execution of the trust. If the appointment of plaintiff as schoolmaster gave him a right to this stipend prescribed by the statutes as a *cesti que trust* as against his trustees, there is no question whatever that the mere circumstances of defendants being a corporation or an ecclesiastical body would not remove the case from the jurisdiction of the court."

After an adjournment to look into authorities, the learned Judge says:—"The answer that I feel compelled to give, after examining, I believe, every case that was cited in argument bearing upon it, is, that this is not a case of trust in the sense above explained (referring to certain cases). The master, upon the true construction of the statutes, ought to be considered only as an officer of the cathedral church appointed for the

purpose of performing one of the duties imposed on the church by the statutes of the founder. I cannot, in this case, for the purposes of the question I have to determine, distinguish the position of the master from that of the master in Attorney-General *v.* Magdalen College (10 Beaven 402), or from other cases in the books in which similar questions have arisen between collegiate bodies and persons holding offices appointed by the founder, but which persons have not been members of the collegiate body. I cannot, upon the construction of the statutes in this case, say that the master is not one of the 'ministri' spoken of. But if the contrary of this could be maintained, I cannot discover a ground for holding that the master is a *cesti que trust* of the cathedral church only because he received a stipend, payable out of the common funds of the defendants, which would not equally oblige me to hold that every officer, to whom a living and a stipend are given, is also a *cesti que trust.* The case of the Attorney General *v.* The Magdalen College is a direct authority in point, and I am satisfied with following that authority. * * * The only question I have to determine is whether the Court of Chancery, in the exercise of its ordinary jurisdiction by bill in a case in which no trust exists, can try the right to the office of schoolmaster, from which the defendants have exercised the power of excluding him. I am of opinion this question must be answered in the negative. Excluding trust, I cannot find a single authority which supports the proposition."

The plaintiff afterwards applied to the Queen's Bench, but failed there because he had not appealed to the visitor named by the founder.

Sir James Wigram did not make this any ground of objection. He said :—"Supposing the Bishop to be the Visitor, and that he has not interfered, I do not know why the court should not, in a plain case, declare the right of the Plaintiff."

The Attorney General *v.* Magdalen College was before Lord Longdale, M.R. The statutes provided for the perpetual maintenance of a schoolmaster, with a named stipend, "out of the common goods of our college."

The Master of the Rolls says :—"If, on the true construction of the statutes, the schoolmaster and usher ought to be considered only as officers appointed, and to be appointed, by the College, for the purpose of performing the duty of the college, in giving instruction to such persons as might attend them, and *the duty of appointing them is not otherwise annexed to the mere property of the college* than by the obligation to pay certain

annual sums of money, and is not of the nature of a trust, the execution of which it is within the jurisdiction of this court to enforce, but the observance of which, according to the statutes of the founder, is to be regulated and enforced, and adequately provided for by the authority of the Visitor, then this breach of duty, whatever it may be, ought to be redressed by the Visitor, and not here. * * * * The College has, no doubt, a very important duty to perform with reference to the school, and the performance of that duty may be enforced by proper authority; but, unless it be a duty founded on a trust which this court can execute, the performance of this duty is not to be enforced here. * * * The revenues of the College belong to the College for its own use, subject, indeed, to the performance of all duties incumbent on the College to perform, but not subject to any trust to be executed in this court. * * * Though there is sufficient proof of the duty and obligations, there is not, in my opinion, evidence of a trust, as the word trust is understood in this court."

The Vice-Chancellor speaks of the Plaintiff, in this case, as "not being a member of the collegiate body." I do not at present see that it would have affected his decision had the master of the school been, by the statutes, a member of the Chapter.

In the case before us the Plaintiff is certainly a member of the body corporate. The charter is curiously comprehensive: it declares that certain ministers and laymen named, "and all and every other such person or persons as now is, or are, or shall, or may at any time hereafter be ministers of the Presbyterian Church of Canada, in connection with the Church of Scotland, or members of the said Presbyterian Church, in such connection, and in full communion with the said Presbyterian Church, shall be and be called one body corporate and politic," &c., &c. The Plaintiff is certainly one of the body corporate; he is also a member of the College Senate; but he is outside the governing body of Trustees, to whom the management of the property and revenues are alone entrusted.

All the cases cited seem distinguishable.

In Dummer *v.* Corporation of Chippenham, the defendants held rent charges for the support of a free school, and brought ejectment against plaintiff, the Master, they having dismissed him, as he said, corruptly, on political grounds, and not on the grounds assigned by them. He asked discovery from the corporators named individually, and a demurrer to his bill was overruled. Lord Eldon says:—"Defendants are entrusted, in

their corporate capacity, with the management of certain property, *clothed with a trust for the maintenance of a schoolmaster*, and for this purpose I represent the case thus, that the corporation have the power of nominating the master, and dismissing him at their will and pleasure. A corporation, as an individual, with such a power over an estate devoted to charitable purposes, would, in this court, be compelled to exercise that power—not according to the discretion of this court—but not corruptly. * * * My opinion is that this is a case in which the court will call upon individuals to answer."

Willis *v.* Child (13 Beav., 117), also relied on, was the case of the Ludlow School. A school-house was appropriated to and held by the plaintiff, and all had been settled years before under a scheme for the government of the charity settled by a previous decree of the Court of Chancery, reported in 3 M. and C. R. The case of Phillips' charity, ex parte Newman (9 Jur. 962), before Knight Bruce, Vice-Chancellor, was a petition under the Romilly Act by the schoolmaster and others. It appeared that a scheme had been settled some years before by the court to regulate the Sutton Free School, and the schoolmaster, besides a fixed stipend, had, after deductions, *one half of certain rents and profits.* After holding the office some time he was dismissed, and reinstated by an order of the court in 1839, in a case not apparently reported. After some years he was again dismissed, and again petitioned, and was again reinstated, the dismissal being irregular.

In the Fremington School case, ex parte Ward (10 Jur. 512), a dwelling and school-house had been devised to trustees to permit and suffer the schoolmaster to occupy while holding the office, and take the issues and profits, and also certain rents of other premises were to be paid to the schoolmaster. The Vice-Chancellor held that the master had "acquired, upon his appointment, a freehold, or an interest in the nature of a freehold and the revenues belonging to it, whether legal or equitable it is not necessary to inquire. Of course I do not say that he became an irremovable master. On the contrary, I assume the competency of the electors or a majority of them to remove him for a just cause. This power, however, they were, as I conceive, bound to exercise not otherwise than judicially."

In the Berkhampstead case also (2 V. and B.), the master was entitled to two-thirds of certain funds arising from rents under a previous scheme for the charity arranged by decree of the court. Lord Eldon said, "If, in the original instrument,

a trust is expressed as to the application of revenue, this court has jurisdiction to compel a due application."

So in the Chipping Sodbury case, before Lord Lyndhurst, the master had a school-house and residence, and certain moneys had been contributed to provide a residence, and it was sought to eject him therefrom.

Where services are wholly in the nature of personal service, the court will not interfere to restrain the removal of an officer. The last case on this subject is Muir *v.* Himalaya Tea Company. (13 L.T. & S., 589.) Wood, Vice-Chancellor, says:—"Assuming the construction of the deed most favorable to plaintiff, that he was an irremovable agent on the terms of his taking the shares, still what could the court do? It could not act on the contract in equity in favor of the plaintiff, as the duties of an agent were in the nature of personal service, and, as such, incapable of being enforced in equity; and so the court could not enforce the fulfilment of the agreement on the agent."

The strongest case in favor of plaintiff is that of Daugars *v.* Rivaz, decided in 1860 by Sir John Romilly, Master of the Rolls (who argued unsuccessfully for the plaintiff in Whiston's case, 7 Hare). (181 Beav.) Daugars was Pastor of the French Protestant Church in London, and being dismissed by defendant, the elders and deacons sought to be restored. King Edward VI. had incorporated a church for foreign Protestants, the corporation being a superintendent and four ministers. After some years the Germans and French separated into different congregations. The charter did not provide for the government and distribution of the funds. The French Church had two ministers, and was governed by a consistory of the two ministers and the elders and deacons.

The Master of the Rolls says:—"On examining the rules it appears that two funds have been created and now exist—one dedicated for the support of the poor, and the other for the maintenance of the ministry and other church matters. * * Wholly apart from the charter of incorporations, a fund exists for the support of the ministry of the church. * * * It appears that the funds of the institution are under the control of the governing body, and the defendants have practically the power of withholding from plaintiff the emoluments assigned to and accepted by him. This constitutes a trust which they have to perform, and which they are bound to perform in favor of the person who fills the office of pastor. And assuming the plaintiff to be wrongly deposed, I am of opinion the relations of trustee and *cesti que trust* does exist between the elders and deacons and the pastor."

It is to be noted that the corporate body under King Edward's charter is not a party to the bill. The Master of the Rolls held this to be unnecessary, and indeed the case seems to be wholly treated as between individuals. The plaintiff, as pastor or minister, was one of the consistory of ministers and elders and deacons. His office may be said to be of the essence of the association, and the existence of the fund for the ministry and the other purposes seems to be the ground of the assumption of the relation of trustee and *cesti que trust.*

The strong impression left on my mind is that in all the cases in which a Court of Equity has interfered to restore an ejected officer, it has been on the ground that there was a right of some specific kind to moneys or lands appropriated to the office, as in the case of a schoolmaster to whom a revenue derived from a specific source, or a house or rent charge, &c., was directly appropriated, and this, as distinguished from a mere claim, to be paid a stipend or allowance taken from some general fund. In other words, when the applicant can point to any specific moneys, or any rents or land, and say that money, rent or house was expressly set apart for me as holding this office, and was held by others for the holder of the office, then the court finds the trust established, and assumes jurisdiction to prevent a wrongful disturbance of the officer. But when nothing but the right to receive a fixed stipend out of a common fund of an institution applied to many various purposes, and especially for the performance of a duty not essential to the existence of the institution, there is nothing on which the court can properly fasten a trust. I therefore think the plaintiff fails on this branch of the case.

Mr. Lewis (page 365, 4 Edt., 1861) points out the distinction thus :—" With the visitorial power the Court of Chancery has nothing to do, (the office of Visitor being to hear and determine all differences of the members of the society among themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed.) It is only as respects the administration of the corporate property that Equity assumes to itself any right of interference."

There is, of course, a marked distinction between the mere dismissal of one salaried officer and the appointment of another to succeed him, and a misappropriation of the trust funds. The latter case would, I presume, be always open to the jurisdiction of the court, and any person interested could invoke its aid. But it seems an abuse of terms to call the plaintiff's dis-

missal in this case an improper dealing with or perversion of the trust estate. He, in my opinion, to ground the jurisdiction, must show that, as regards some portion of the fund, he is *cesti que trust*, and the defendants trustees for him.

If there were a Visitor named under the charter, it would seem that it would be his province to arrange such a difficulty as has occurred in this case, following, as it seems, within the definition given above of the visitorial power.

The jurisdiction and duty of the court, where there is a misappropriation of trust funds, is explained by the Master of Rolls in the well-known case, Attorney General *v.* St. Cross Hospital. (17 Beav., 266.) There the funds had been actually perverted from their proper purpose. He says:—"Where there is a clear and distinct trust, this court administers and enforces it as much where there is a Visitor as where there is none. This is clear both in principle and authority. The Visitor has a common low office, and common low duties to perform, and does not superintend the performance of the trust which belongs to the various officers, which he may take care to see are properly kept up and appointed."

No Visitor is named here, and the further difficulty arises from the fact that the Crown gave no endowment, although creating the corporation for the public purposes of a University.

In the ordinary case of a royal foundation, the Crown would be the Visitor, and would, through the Lord Chancellor sitting in camera, act as such, as Lord Eldon did in 1821, sitting for the King in the case of Queen's College (Jacobs 1), directing what persons were duly elected as Principal and Fellows. Lord Hardwicke, in Green *v.* Rutherford (a case frequently quoted), says:—"The original of all such powers is the property of donor, and the power every one has to dispose, direct and regulate his own property, like the case of patronage. If the charity is not vested in the persons who are to partake, but in trustees, for their benefit, no Visitor can arise by implication; but the trustees have that power." And it was held that there being a subsequent gift of property, under particular trust, by a third person not the founder, the Visitor had not jurisdiction to interfere as to it.

Again, in Attorney General *v.* Dedham School (23 Beaven, 256), the Master of the Rolls takes a similar view.

Sir James Wigram says, in Whiston's case, "where there is no Visitor the Court of Queen's Bench may be the proper court to redress the wrong."

On this branch of the case, I am of opinion that, if the

alleged breach of trust were such as on the authority of the cases could be cognizable in equity, the existence of a Visitor would not necessarily be a bar. I have met with no case like the present, in which a professor in a college, under such a charter as this, has sought for reinstation. I see nothing in the voluminous statement of facts laid before us to induce us to make a precedent, if there be none. As Buller, J., says, in Rex *v.* Bishop of Ely (2 T. R. 337):—"I have never been inclined to assume a jurisdiction on any subject which I have not found to have been previously exercised by the court, particularly in questions between members of the colleges of the universities. In such cases my inclination is against the jurisdiction of the court, unless I am compelled by legal authorities to support it."

Unless the right of plaintiff to the intervention of the court were most clearly shown, I think if the court have discretion to refuse interference, that this is preeminently a case in which the plaintiff should have been left to seek a compensation in damages, if wrongfully dismissed. It is of vital importance to such an institution that confidence and harmony should exist between the trustees and the professors. That an apparently irreparable breach has widened between them is apparent on the facts before us.

The remarks of Knight Bruce, Vice-Chancellor, in Pickering and Bishop of Ely (2 Y. & C.C.C. 249), are in point. Plaintiff held the ancient office of Receiver-General of the Diocese of Ely by grant from the Bishop, binding on his successors for life, with an annuity of £10 from the revenues, with diet for himself and forage for horses. A large portion of his fees were from drawing diocesan leases, &c. He filed his bill to restrain the Bishop from taking away from him this conveyancing business. The Vice-Chancellor says:—"Being of opinion that the alleged rights of the plaintiff, in the breadth and length in which he claims to be protected in them, are of a nature neither usual nor convenient, nor without hardship or pressure upon the Bishop, I consider it more fit for a Court of Equity to leave the plaintiff to obtain redress by damages or otherwise, in a court of law, than to exercise its peculiar jurisdiction by compelling the Bishop specifically to submit to the practical exercise of such rights, if rights they be." He then notices the want of mutuality, and that if the Bishop sued plaintiff in equity to compel a performance of his duties, he would be refused relief. He says on that and the other grounds he dismisses the bill.

The same Judge comments approvingly on this case, in a

case some years later, of Johnston *v.* Shrewsbury Railway Co. (3 D. G. M. & G. 927).

A large number of the cases cited have been decided under stat. 52 Geo. III. ch. 101 (called Sir S. Romilly's Act), passed in 1812, the proceedings being avowedly under that statute.

It enacts, that "in every case of a breach of any trust, or supposed breach of any trust, created for charitable purposes, or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the Lord Chancellor, &c., stating such complaint, and praying such relief as the nature of the case may require," &c. Such petition has to be verified in a particular manner, and shall be first allowed by the Attorney General. An appeal is allowed to the House of Lords.

The Berkhampstead case, the Fremington School case, and Phillip's Charity, &c., were all expressly under this act. The Ludlow case (Willis *v.* Childe) was under a special act, 9 and 10 Vic. ch. 18. Grammar schools are regulated by 3 and 4 Vic. ch. 77.

This act may be regarded as affecting procedure, rather than jurisdiction, as we find cases in which the court decline disposing of large questions on petition under the act, but direct parties to proceed by information (15 Sim. 262, Tudor's Char. Trusts, 148, 175.)

It would not be right perhaps for this court to dismiss the plaintiff's bill for want of equity, without expressing an opinion on the nature of his appointment, and the right to dismiss him on the part of the trustees.

The late learned Vice-Chancellor Esten, in his short judgment on granting the interim injunction, considered that the plaintiff held his appointment during good behaviour, while the duties of his office were performed; that his legal remedy was inadequate, and that he was entitled to the protection of the court.

After the evidence was taken before the learned Chancellor at Kingston, he appears to have held that as the legal question had been determined by the Vice-Chancellor, he thinks he should hold the plaintiff entitled to a decree, although he doubted the jurisdiction of the court to interfere.

On the re-hearing, the only reported judgment is that of my brother Spragge, who reviewed the authorities, and decided in favour of the existence of the jurisdiction, and for the full relief of the plaintiff, but without express reference to the question whether the case was such as called for its exercise.

As to the tenure of office, the charter gives no express directions on this point, and Vice-Chancellor Esten says that "the trustees have power to appoint for life, or for a term of years, or during pleasure."

Apart from any implication of law arising from the nature of plaintiff's office under the charter, we see nothing in the evidence of any contract for any engagement of plaintiff beyond a general hiring, which the law would probably hold to be a yearly hiring, determinable, as such, in the usual manner.

The charter gives full powers to the trustees to regulate the number, residence and duties of the professors, the management of the revenues and property of the college, and the stipends, &c., of the professors, officers and servants thereof, and also from time to time to vary and alter their statutes.

Section 15 enacts, that if any complaint respecting the conduct of the principal, or any professor, master, tutor, or other officer of the college, be made to the trustees, they may institute an inquiry, and in the event of any impropriety of conduct being duly proved, they shall admonish, suspend, or remove the person offending, as to them may seem good. (Sec. 16). Provided always, that the grounds of such admonition, reproof, suspension or removal, be recorded at length in the books.

Section 25 provides, that five trustees, lawfully convened, shall be a quorum for dispatch of business, except for the disposal and purchase of real estate, or for the choice or removal of the principal or professors, for any of which purposes there shall be a meeting of at least thirteen trustees.

If the effect of these clauses be to prevent the removal of a professor, except for impropriety of conduct, &c., the view of the late Vice-Chancellor, as to a power to appoint during pleasure, can hardly be sustained.

The sections, no doubt, allow such a complaint to be made, and an inquiry and a power of correction or removal; and it is further clearly provided, that a professor cannot be removed except at a meeting of at least thirteen trustees.

If the effect of the charter be, that the tenure of office of a professor is for life, subject to removal only for expressed impropriety of conduct, then it seems to me that the trustees could not lawfully appoint, during their own pleasure, as my brother Spragge points out at page 399 of his judgment. (See also Darlington School case, 6 Q. B. 682; and per Lord Lyndhurst, 8 Law Journal, 10.)

The plaintiff, under the charter, is a member of the senate. As such, it may be argued that he is a corporate officer, and falls within the rule to be found in many books, that, as in Grant on Corporations, 34, "Where a charter gives power to appoint an officer, an appointment for life will be intended, unless it appears otherwise, either from other parts of the charter, or the nature of the office."—Comyn's Digest, Franchise, F, 32.

It is not easy to find any direct authority as to the tenure of a professor. Is it an *office* in the sense used in many of the text writers? Is he a public officer in the same sense?

In a removal case, reported in 7 East 167, Rex *v.* Mersham, the question was whether a person came within the statute 3 Wm. and Mary, ch. 11, as "holding a public office or charge." Lord Ellenborough says:—"An office must be derived immediately or mediately from the crown, or be constituted by statute; and this is neither one nor the other, but merely arising out of a contract with the parish, which the parish officers, with consent of parishioners, are by the statute enabled to make with any persons, for the maintenance and employment of the poor. The question might admit of a different consideration, if any distinction had been established between a *public office* and a *public charge;* but I can find no such distinction, either in any adjudged case, or in the sense of the statute." Again he says:—"Perhaps the best criterion for determining whether this man were an officer, was to consider whether he were indictable for the negligent discharge of the duty which he engaged to discharge." Lawrence, J., says:—"This is clearly no office, but an employment arising out of a contract."

Baggs' case (11 Rep. 98) is always cited on this subject of tenure; but it concerns the disfranchising of a freeman in a borough.

The Darlington School case (6 Q. B. 682) reviews many of the authorities. There the schoolmaster, under the charter, was removable in the discretion of the governors. Chief Justice Tindal notices the plaintiff's contention that his appointment was during good behaviour; "so that he had in contemplation of law a freehold in his office. * * If he had, as in Baggs' case, a freehold in his freedom for his life, and with others in their politic capacity, an inheritance in the lands of the corporation; or if the office of schoolmaster resembled that of a parish clerk, as in Gaskin's case (8 T. R. 209), the inference drawn from these cases would be correct.

But, looking to the terms of Queen Elizabeth's Patent, we think the office in question is in its original creation determinable at the sound discretion of the governors, whenever such discretion is expressed; and that it is, in all its legal qualities and consequences, not a freehold, but an office *ad libitum* only."

He subsequently declares that whatever tenure was created by the charter, the governors had no power to make bylaws altering it.

As to corporate offices, it had long been asserted on Baggs' case "that there can be no power of amotion unless given by charter or prescription." Lord Mansfield, in Rex *v.* Richardson (1 Bur. 539) says:—"We think that from the reason of the thing and from the nature of corporations, and for the sake of order and government, this power is incident as much as the power of making by-laws."

But the chief difficulty with us is, whether the office of the plaintiff is in itself of that public character which warrants the interference of either a court of law or equity, beyond the investigation of any claim for pecuniary damages from a wrongful dismissal.

Queen's College had no public endowment or foundation. It has a royal charter of incorporation—a power to grant degrees, but no right of visit or inquiry was reserved to the crown.

The case cited of Gibson *v.* Ross (7 Cla. & F. 250), in the House of Lords, expressly decides that the mere fact of being incorporated by charter did not make the Tain Academy other than a private institution. The Lord Chancellor (Cottenham) says:—"It has been decided that when individuals establish a school to be maintained from private funds, the regulations under which public schools are conducted are not to be deemed applicable to them. A public schoolmaster is a public officer, and as such he cannot be dismissed without an assigned and sufficient cause. But it is clear that in the case of a private trust this rule does not apply. * * Then arises another question, namely, one relating to the effect of an incorporation. I asked, in the course of the argument, whether there was any line of distinction drawn between the case of a private establishment, the members of which had been incorporated, and a case in which no such incorporation had taken place, and I could not find that any such distinction had ever been adopted. If so, then I am sure that your lordships would not for the first time introduce a distinction;

nothing could more disturb the arrangement of a private establishment than that a subordinate officer in it should be considered to have a fee in his office."

Again, "If the charter of incorporation impose any restrictions on them, they would by the acceptance of it be considered to enter into a contract with the crown to exercise their authority, subject to these restrictions. * * It is clearly established that a private society would have the right to dismiss a master, and there is no difference here between these parties and any other private society, except that these parties are incorporated.

Lord Hardwicke said, in Attorney-General *v.* Place (2 Atk. 88), "The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be, but it is the extensiveness which will constitute it a public one." This was a case merely on the construction of words of bequest in a will.

The subject is much discussed in 2 Kent's Commentaries, 276. He says:—"An hospital founded by a private benefactor is, in point of law, a private corporation, though dedicated by its charter to general charity. A college founded and endowed in the same manner is a private charity, though from its general and beneficial objects it may acquire the character of a public institution. * * Every charity which is extensive in its object may, in a certain sense, be called a public charity, nor will a mere act of incorporation change a charity from a private to a public one. * * A charity may be public though administered by a private corporation. * * The charity of almost every hospital and college is public, while the corporations are private. To hold a corporation to be public because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord Coke." At page 298 the same author points out the distinction between "amotion" and "disfranchisement," the former applying to officers, the latter to members.

In the celebrated case of Bowdoin College (Allan *v.* McKean, 1 Sum. 277), Mr. Justice Story elaborately reviews the law; noticing at large the equally famous Dartmouth College case (4 Wheaton, 534), he says, "that Chancellor Kent has stated the law with his usual accuracy and clearness;" and adds, "that a college, merely because it receives a charter from government, though founded by private benefactors, is not thereby constituted a public corporation, controllable by the

government, is clear beyond all doubt. So the law was understood by Lord Holt in his celebrated judgment in Phillips *v.* Bury (2 T. R. 346)."

He proceeds, "if we examine the charter of Bowdoin College, we shall find that it is a private, and not a public corporation. It answers the very description of a private college, as laid down by Chief Justice Marshall, in Dartmouth College *v.* Woodward. It is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the objects of that bounty. Its trustees were originally named by the founder, and invested with the power of perpetuating themselves. They are not public officers, nor is it a civil institution, but a charity school or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creators."

It is not expressly stated in the report, but it may be inferred, that Bowdoin College had university powers to grant degrees, as in one of the by-laws it speaks of "fees for any diploma or medical or academical degree."

Dartmouth College was, by royal charter, empowered to grant "any such degree and degrees as are usually granted in either of the universities or any other college in Great Britain."

Queen's College is a very wide corporation, embracing all members and laymen of the Presbyterian Church in Canada in connection with the Church of Scotland, in full communion with said church. The government is vested in twenty-seven trustees, and all the congregations in the province admitted on the roll of the Synod may name one person, who shall be put on a list of names, from which, under certain restrictions, new trustees must be selected.

I am not prepared to hold that to this corporation we are not to apply the rules of law referred to as governing such institutions in the two American cases.

It rests wholly with the trustees to create the office of a professor, and such an office is not, as it seems to me, of the essence of the corporation. The latter could exist without it.

If the charter were silent as to provisions for the removal of a professor, I should at once hold that such an officer is removable by the trustees, and his office or situation at once by their decision be vacant, subject to any claims for salary in the usual way, if the engagement be of a yearly nature; but not subject to any jurisdiction of either a court of law or equity to restore; that the service would be of a peculiarly personal

character, and damages for any proved breach of contract the only remedy.

It is conceded that the trustees could abolish the chair of classical literature, and that its incumbent's rights would cease with it.

Mr. Weir could be "amoved" from the office of professor, although he could not, without cause, be "disfranchised" as a member of the corporation, according to Chancellor Kent's definitions. His dismissal from his situation still leaves him a member of the corporate body.

It seems also conceded that the trustees can alter and regulate the emoluments of any professor.

This power is important to be considered. Unless the plaintiff can maintain his right to a legal interest or estate in the office and its emoluments, as they were at his induction—if he be always liable to any reduction in the discretion of the trustees, or to an optional abolition of the office by the same body, it seems more a matter of form than substance to urge his right to a restoration by legal process.

The office is not essential to the existence of the corporation, or to the discharge of its functions; it exists at the discretion of the trustees, and its emoluments depend also on them.

It only remains to consider if the words of the charter restrict the right of removal, which (in the absence of such words) I think clearly exists.

It seems apparent, I think, that any removal of a professor must be at a meeting of at least thirteen trustees (Charter, sec. 25.)

The supplemental answer shows that this took place in May, 1865, after the bill filed.

But does section 15 declare the only manner and the only cause for which a professor can be removed? "If any complaint respecting the conduct of the principal, or any professor, master, tutor or other officer of the said college, be at any time made to the board of trustees, they may institute an inquiry, and in the event of any impropriety of conduct being duly proved, they shall admonish, reprove, suspend or remove the person offending, as to them may seem good; provided always, that the grounds of such admonition, reproof, suspension or removal, be recorded at length in the books of the said board."

These sections do not seem to have been followed in the plaintiff's case. Is he still, therefore, *de jure*, professor of classical literature?

If a professor can only be removed in the manner prescribed

by this section, the same rule must certainly apply to the other persons named, viz., "masters, tutors and other officers." All of whom would be equally irremovable except as therein provided. Sir James Wigram, in the case already cited, pointed out that if the master of the grammar school could make out the existence of a trust in his favor, the "Janitor," on being discharged, might equally come to court for restoration.

A master or tutor, casually employed, or any other of the many "officers" about a University, might, on one construction of this section, be equally irremovable with the Principal.

Once granted that the office is one under the original charter, in the sense contended for by plaintiff, it seems to follow on the authorities that its holder takes it with all its original rights of tenure, and that even by agreement he cannot be reduced to a lesser interest.

We may give effect to the 15th and 16th sections by confining them to cases in which, on complaint made, the officer can be dismissed, leaving him no claim for legal damages thereby. This would be a dismissal for cause.

On the other hand, a dismissal such as took place in this case, at the May meeting, would be at the discretion of the trustees, and may leave them liable to an action for arrears of salary, in the absence of a notice terminating at the proper time, on the usual principle.

There seems no alternative between this construction and declaring that every professor, master, tutor, or other officer, holds his appointment irremovable, except for cause, in strict pursuance of the 15th section.

The words used in the charter declare no distinction between the higher and the lower officers, and the rights urged by plaintiff must, if he succeed, be conceded to many below him in position.

I have already stated that I consider he fails to establish his rights merely as inherent to his holding of such an office under such a charter, and that his main dependence must be that any proceeding to oust him must be under those sections.

We should pause long before giving effect to plaintiff's argument, with all its inevitable consequences.

As Lord Cottenham said in Gibson *v.* Ross (7 Clk. & F. 250), "There are many cases in which it would be highly inexpedient for the interests of a body like these trustees, that a man should continue in his situation, though it might be difficult to show a legal ground for his removal. He may be unsuccessful in the discharge of his duties: he may have great

abilities, but yet be unable effectually to exert them in the instruction of his pupils. This might be great evil to an institution of this nature, and yet it might not amount to a cause which in a court of justice would justify the dismissal of the master. At the same time it must be admitted that the circumstances I have mentioned would form a good ground for desiring the master's dismissal."

It is needless to enlarge this list of actual, though not perhaps legal disqualifications. An unstained moral character, high intellectual attainments, and unsparing activity in the discharge of duty, may, and often do, co-exist with unhappy forms of temper, restless irritability and morbid sensitiveness, or jealousy, which may utterly unfit their possessor for the useful discharge of the delicate duties of education, and the creation of respect and confidence amongst fellow-workers and pupils.

The court anxiously avoided all intermeddling with the merits or demerits of individuals in the unfortunate disputes that have resulted in this litigation.

It is sufficient to say that, wherever the blame rested, a state of things was disclosed most injurious to the best interests of Queen's College.

We are anxious to carry out the benevolent directions of the last section of the royal charter, which enjoins on courts of justice that its language "shall be construed and adjudged in the most favourable and beneficent sense for the best advantage of our said college."

I have bestowed much consideration on the argument of plaintiff as to his legal right as professor, and have at last (although not without some doubt), arrived at the conclusion that he was removable by the trustees, at a meeting where the statutable number of members was present, although not for cause under the 15th section.

I think the appeal must be allowed—that the plaintiff's bill in the court below should be dismissed. I think the case against him, as to the want of jurisdiction in the court below, is reasonably clear; that his interest in his office is not such as he claims; and lastly, that the case disclosed is one in which neither a court of equity nor law should interfere, except on the very clearest and most conclusive pressure of authority and precedent.

Tuesday the Twenty-fourth day of April, in the Twenty-ninth year of the reign of Her Majesty Queen Victoria, and in the year of our Lord 1866.

IN CHANCERY.

VICE-CHANCELLOR SPRAGGE.

BETWEEN

THE REVEREND GEORGE WEIR,

Plaintiff,

AND

THE REVEREND ALEXANDER MATHIESON, THE REVEREND HUGH URQUHART, THE REVEREND ALEXANDER SPENCE, THE REVEREND JOHN MCMORINE, THE REVEREND WILLIAM MAXWELL INGLIS, THE REVEREND JAMES WILLIAMSON, THE REVEREND DUNCAN MORRISON, THE REVEREND GEORGE BELL, THE HONOURABLE JOHN HAMILTON, JOHN PATON, GEORGE DAVIDSON, GEORGE NEILSON, JOHN CAMERON, ALEXANDER MCLEAN, HUGH ALLAN, ALEXANDER MORRIS, GEORGE MALLOCH, ALEXANDER LOGIE, THE REVEREND JOHN COOK, D.D., THE REVEREND JAMES C. MUIR, D.D., THE REVEREND JOHN BARCLAY, D.D., JOHN THOMPSON, JOHN GREENSHIELDS, EDWARD MALLOCH, ANDREW DRUMMOND, AND QUEEN'S COLLEGE AT KINGSTON,

Defendants.

Upon motion made unto this Court on the sixteenth and twenty-third days of April instant, on behalf of the above-named Defendants, who have answered the Plaintiff's bill in this cause for an order to carry into effect the order and judgment of the Court of Error and Appeal, made upon the appeal from the decree of this Court by the said last-mentioned Defendants, and bearing date the sixteenth day of March last, in presence of Counsel for the said Plaintiff, and for the last-mentioned Defendants; upon opening of the matters, and upon hearing read the said order of the Court of Error and Appeal, and the several decrees and orders in this cause, and upon hearing what was alleged by Counsel aforesaid, this Court did order the said motion to stand over for judgment, and the same coming on this present day for judgment, this Court doth order that it be referred to to the Master of this Court, to take an account of the sums of money, in and by the said order on appeal, ordered to be repaid by the said Plaintiff to the said Defendants, Queen's College, at Kingston, including the sum of seven hundred and fifty dollars paid by the Defendants, Queen's College, at Kingston, under the order of this Court,

bearing date the thirty-first day of October, one thousand eight hundred and sixty-four; and this Court doth further order that the Plaintiff do pay to the Defendants, who have answered the said bill, their costs of this suit, to be taxed by the said Master, including the costs of the motion for an injunction, and the costs of the rehearing, and to repay to the said Defendants the deposit and the other costs, if any, of the said rehearing, deceived by the Plaintiff from the said Defendants. And this Court doth further order that the bonds filed by or on behalf of the said Defendants by way of security for the performance of the decree, and for the costs of the said appeal, respectively be vacated and discharged.

(Signed)

A. GRANT,
Registrar.

NOV 11